No. 89-1584

In The

Supreme Court of the United States

October Term 1989

DEAN WITTER REYNOLDS INC. and
JEFFREY HINES,

Petitioners,

v.

FLORABELLE COFFEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Respondent Florabelle Coffey respectfully requests that the Petition for Writ of Certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit, entered on December 5, 1989 and modified on January 11, 1990, be denied.

OPINIONS BELOW

The Respondent concurs with the Petitioners' statement of the Opinions Below.

JURISDICTION

The Respondent concurs with the Petitioners' statement of Jurisdiction.

STATUTE AND RULE INVOLVED

The Respondent concurs with the Petitioners' statement of the Statue and Rule Involved.

STATEMENT OF THE CASE

The Respondent concurs with the Petitioners' Statement of the Case.

ARGUMENT FOR DENYING THE WRIT

The Tenth Circuit decision reversing the Trial Court's Order Compelling Arbitration between the parties is in accordance with this Court's decisions in *Shearson/American Express Inc. vs. McMahon,* 482 U.S. 220 (1987) and *Rodriguez de Quijas vs. Shearson/American Express, Inc.,* 109 S.Ct. 1917 (1989). In those cases, while finding that Federal Securities claims under the Securities Exchange Act of 1934 ("Exchange Act") are subject to arbitration, such arbitration is only to be compelled where there is a contract requiring the same between the parties. The Tenth Circuit majority opinion correctly held that SEC Rule 15c2-2 as promulgated by the Securities and Exchange Commission became part of the contract between the

parties and abrogated any other requirement in the agreement to arbitrate a claim arising under the contract, which claim arose during the period of time that the Rule was in effect.

Respondent concedes that there is a conflict in the Circuits as to the effect of the recision of SEC Rule 15c2-2 and its effect on arbitration agreements. Nevertheless, the number of presently pending cases in which this issue would be involved, and the likelihood of any such cases arising in the future, is minimal. The SEC rescinded Rule 15c2-2 in October 1987. The issue involved in this case would only relate to those customers making claim pursuant to a customer agreement entered into before the SEC announced its adoption of Rule 15c2-2 on November 18, 1983, and before its recision of the Rule on October 21, 1987.

I. THE TENTH CIRCUIT DECISION RECOGNIZED THE FUNDAMENTAL PRINCIPLE THAT IN ORDER TO COMPEL ARBITRATION THERE MUST BE AN ENFORCEABLE AGREEMENT BETWEEN THE PARTIES TO DO SO.

The essential basis of *Shearson/American Express, Inc., v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989), and the earlier decision of this Court in *Dean Witter Reynolds v. Byrd*, 105 S.Ct. 38 (1985) is that customer agreements between customers and brokers containing arbitration clauses are contracts that will be enforced absent public policy considerations or statutes to the contrary. Paragraph 2 of the Customer Agreement between the parties provided, in part:

> 2. Whenever any rule or regulation shall be proscribed or promulgated by . . . Federal Securities and Exchange Commission . . . which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be modified or superceded as the case may be, by such . . . rule or regulation, and all other provisions of the agreement and the provisions as so modified or superceded, shall in all respects continue to be in full force and effect.

The Tenth Circuit decision found that from a private contractual perspective, the arbitration agreement between the parties herein was modified by the SEC Rule and, thus, became part of the contract between the parties. SEC Rule 15c2-2, adopted on November 28, 1983, and which was therefore part of the agreement at the time of the wrongdoing alleged by Respondent, provided, in pertinent part:

> (a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.
>
> (b) Notwithstanding paragraph (a) of this section, until December 31, 1984, a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983, are accompanied by the separate written disclosure: "Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future

> dispute or controversy that may arise between us you are not required to arbitrate any dispute or controversy that arises under the federal securities laws, but instead can resolve any such dispute or controversy through litigation in the courts.
>
> (c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983, if: (1) any such public customer for whom the broker or dealer has after July 1, 1983 . . . effected a securities transaction is sent, no later then the disclosure prescribed in paragraph (b) of this section . . . "

Regardless of whether Rule 15c2-2 was prudently adopted, and whether or not Rule 15c2-2 was ultimately rescinded because of a later decision of this Court, the Rule was nevertheless in effect at all times pertinent hereto and was thus part of the contract between the parties. The mandate of this Court is that contracts must be enforced as written as the agreement between the parties.

II. THE ISSUE PRESENTED BY THE PETITIONERS WILL AFFECT FEW CASES AND LITIGANTS.

The Respondent concedes that there is a conflict among the circuits as to the effect of the recision of the Rule 15c2-2 upon agreements to arbitrate broker/customer disputes. Nevertheless, even though there is such a conflict, the resolution thereof will not substantially affect many cases yet to be decided or which might be filed in the future.

Since Rule 15c2-2 was rescinded in October, 1987, the statute of limitations has or soon will have run on most claims arising for wrongdoing before rescission of the Rule. Thus, the facts of this case are not likely to recur with sufficient frequency.

Finally, virtually none of the cases cited by Petitioners at footnote 1 of their argument relate to the same or similar facts as involved with herein. In those cases, virtually none of the customer agreements involved contained a clause in the contract between the parties incorporating any rules or regulations (such as Rule 15c2-2) as terms of the contract. The cases cited by Petitioners in which the courts wrestled with the effect of the rescission of Rule 15c2-2 on arbitration agreements for the most part simply involve whether arbitration could or could not be compelled simply because of Rule 15c2-2 itself and not because the Rule became part of the contract between the parties. Since the facts of this case are peculiar and are not likely to recur, a Writ of Certiorari to the Tenth Circuit should not be issued.

CONCLUSION

The Tenth Circuit's decision is simply an enforcement of the contract between the parties. Contrary to the Petitioner's assertion, the Tenth Circuit did not reject the jurisprudence established by this Court but, to the contrary, simply reinforced that jurisprudence. This Court's guidance is not essential to the continued enforceability of arbitration agreements in the arbitration in claims arising under the Securities Exchange Act of 1934. For these

reasons, no Writ of Certiorari should be issued to review the judgment and decision of the Tenth Circuit Court of Appeals, and that decision should be allowed to stand.

Respectfully submitted this 16th day of July, 1990.

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